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10786158

IN THE MATTER OF:)	SETTLEMENT AGREEMENT
)	
Ward Transformer Superfund Site)	U.S. EPA Region 4
Raleigh, Wake County, North Carolina)	CERCLA Docket No. 04-2010-3773
)	
Air & Electric Equipment Company, Inc.,)	PROCEEDING UNDER SECTION
f/k/a H. Bernstein & Company)	122(h)(1) OF CERCLA
SETTLING PARTY)	42 U.S.C. § 9622(h)(1)
)	

I. JURISDICTION

1. This Settlement Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated from the Regional Administrator through the Director of the Superfund Division (formerly the Waste Management Division), through the Associate Division Director for the Office of Superfund and Emergency Response, to the Chief of the Superfund Enforcement and Information Management Branch by EPA Regional Delegation No. 14-14-D. This Settlement Agreement is also entered into pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States, which authority, in the circumstances of this settlement, has been delegated to the Assistant Attorney General of the U.S. Department of Justice's Environment and Natural Resources Division.

2. This Settlement Agreement is made and entered into by EPA and Air & Electric Equipment Company, Inc., f/k/a H. Bernstein & Company ("Settling Party"). Settling Party consents to and will not contest the authority of the United States to enter into this Settlement Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Settlement Agreement concerns the Ward Transformer Superfund Site ("Site") located in Raleigh, Wake County, North Carolina. EPA alleges that the Site is a facility as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and will undertake additional response actions in the future. The Site was added to the National Priorities List on April 30, 2003. From April 2003 to April 2007, EPA conducted a phased remedial investigation (RI) and feasibility study (FS) for the Site. In September 2005, EPA entered into an Administrative Settlement Agreement and Order on Consent with a group of Potentially Responsible Parties (PRPs) for the performance of a time-critical removal action at

the Site and the reimbursement of past response costs. The removal action included contaminated soil/sediment removal at the Ward Transformer facility and some immediately surrounding areas, including Reach A. "Reach A" is the section of the unnamed tributary to Little Brier Creek that starts at the Ward Transformer facility storm water treatment plant outfall and continues west-southwesterly for approximately 2,100 ft (0.4 mile) before entering the first culvert beneath the first I-540 crossing. On September 29, 2008, a Record of Decision (ROD) was issued for Operating Unit 1 ("OU1") which includes the areas downgradient from the Ward Transformer facility as described in the ROD including: Reaches B, C, and D; Brier Creek Reservoir; Brier Creek; Lake Crabtree; and Lower Crabtree Creek. "Reach B" is the section of the unnamed tributary to Little Brier Creek, downstream of the Ward Transformer facility, starting at the exit of the culvert on the west side of I-540, and continuing west-southwesterly for approximately 1,500 ft (0.3 mile) before entering a culvert beneath the Lumley Road crossing. "Reach C" is the section of the unnamed tributary to Little Brier Creek that starts from the terminus of Reach B and continues south-southwesterly for approximately 2,100 ft (0.4 mile) to its confluence with Little Brier Creek proper and a culvert beneath the second I-540 crossing. "Reach D" is the section of Little Brier Creek that starts at the exit of the culvert beneath the second I-540 crossing and continues southerly for approximately 4,200 ft (0.8 mile) to its mouth at Brier Creek Reservoir, located in the vicinity of the culverts beneath the Globe Road crossing. Further investigation of the nature and extent of the contamination for all media at or from Operable Unit 2 (OU2) as well as an evaluation of cleanup options that may be needed for OU2 is necessary. OU2 includes the Ward Transformer facility, certain parcels adjacent to the facility, and nearby drainage pathways upgradient of Reach B..

5. In performing response action at the Site, EPA has incurred response costs and will incur additional response costs in the future.

6. EPA alleges that Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for response costs incurred and to be incurred at the Site.

7. EPA has reviewed the Financial Information submitted by Settling Party to determine whether Settling Party is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, EPA has determined that Settling Party has limited financial ability to pay for response costs incurred and to be incurred at the Site.

8. EPA and Settling Party recognize that this Settlement Agreement has been negotiated in good faith and that this Settlement Agreement is entered into without the admission or adjudication of any issue of fact or law. The actions undertaken by Settling Party in accordance with this Settlement Agreement do not constitute an admission of any liability. Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the facts or allegations contained in this Section.

III. PARTIES BOUND

9. This Settlement Agreement shall be binding upon EPA and upon Settling Party and its successors and assigns. Any change in ownership or corporate or other legal status of Settling Party, including but not limited to any transfer of assets or real or personal property, shall in no way alter Settling Party's responsibilities under this Settlement Agreement. Each signatory to this Settlement Agreement certifies that he or she is authorized to enter into the terms and conditions of this Settlement Agreement and to bind legally the party represented by him or her.

IV. STATEMENT OF PURPOSE

10. By entering into this Settlement Agreement, the mutual objective of the Parties is to avoid difficult and prolonged litigation by allowing Settling Party to make cash payments to address its alleged civil liability for the Site as provided in the Covenant Not to Sue by EPA in Section VIII, subject to the Reservations of Rights by EPA in Section IX.

V. DEFINITIONS

11. Unless otherwise expressly provided herein, terms used in this Settlement Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement Agreement or in any appendix attached hereto, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- b. "Day" shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- c. "Effective Date" shall mean the effective date of this Settlement Agreement as provided in Section XVI.
- d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies, or instrumentalities of the United States.
- e. "Financial Information" shall mean those financial documents identified in Appendix B.
- f. "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the

rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

g. "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral or a lower case letter.

h. "Parties" shall mean EPA and Settling Party.

i. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

j. "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.

k. "Settlement Agreement" shall mean this Settlement Agreement and any attached appendices. In the event of conflict between this Settlement Agreement and any appendix, the Settlement Agreement shall control.

l. "Settling Party" shall mean Air & Electric Equipment Company, Inc., f/k/a H. Bernstein & Company.

m. "Site" shall mean the Ward Transformer Superfund Site located in Raleigh, Wake County, North Carolina. The Site includes the Ward Transformer facility, certain parcels adjacent to the facility, and nearby drainage pathways, as well as the areas downgradient from the Ward Transformer facility as described in the ROD, and is generally depicted on the map attached as Appendix A.

n. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

VI. PAYMENT OF RESPONSE COSTS

12. Settling Party shall pay to the EPA Hazardous Substance Superfund the principal sum of \$10,000, plus an additional sum for Interest as explained below. Payment shall be made in eight (8) quarterly installments. Each installment, except for the first, on which no Interest will be due, shall include the principal amount plus an additional sum for accrued Interest on the declining principal balance calculated from the Effective Date of this Settlement Agreement as defined in Paragraph 33. The first payment of \$1,250 shall be due within 30 days of the Effective Date of this Settlement Agreement. Subsequent payments of \$1,250 shall be due on January 1, 2011, April 1, 2011, July 1, 2011, October 1, 2011, January 1, 2012, April 1, 2012, and July 1, 2012. Settling Party may accelerate these payments, and Interest due on the accelerated payments shall be reduced accordingly.

Payment shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or letter accompanying the check, shall reference the name

and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # A4S4, and the EPA docket number for this action, and shall be sent to:

U.S. Environmental Protection Agency
Superfund Payments – Region 4
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

At the time of each payment, Settling Party shall also send notice that payment has been made to EPA in accordance with Section XIII (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID # A4S4 and the EPA docket number for this action.

13. The total amount to be paid by Settling Party pursuant to Paragraph 12 shall be deposited by EPA in the Ward Transformer Superfund Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

VII. FAILURE TO COMPLY WITH SETTLEMENT AGREEMENT

14. Interest on Late Payments. If Settling Party fails to make any payment required by Paragraph 12 by the required due date, all remaining installment payments and all accrued Interest shall become due immediately upon such failure. Interest shall continue to accrue on any unpaid amounts until the total amount due has been received.

15. Stipulated Penalty.

a. If any amounts due under Paragraph 12 are not paid by the required date, Settling Party shall be in violation of this Settlement Agreement and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 14, \$750 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # A4S4, and the EPA docket number for this action, and shall be sent to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

c. At the time of each payment, Settling Party shall send notice that such payment has been made to EPA in accordance with Section XIII (Notices and Submissions). Such notice shall identify the Region and Site-Spill ID # A4S4 and the EPA Docket Number for this action.

d. Penalties shall accrue as provided above regardless of whether EPA has notified Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

16. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to the United States by virtue of Settling Party's failure to comply with the requirements of this Settlement Agreement, if Settling Party fails or refuses to comply with any term or condition of this Settlement Agreement, it shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States brings an action to enforce this Settlement Agreement, Settling Party shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

17. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Settlement Agreement. Settling Party's payment of stipulated penalties shall not excuse Settling Party from payment as required by Paragraph 12 or from performance of any other requirements of this Settlement Agreement.

VIII. COVENANT NOT TO SUE BY EPA

18. Except as specifically provided in Section IX (Reservations of Rights by EPA), EPA covenants not to sue or to take administrative action against Settling Party pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), with regard to the Site. With respect to present and future liability, this covenant shall take effect upon receipt by EPA of the first payment required by Section VI, Paragraph 12 (Payment of Response Costs). This covenant not to sue is conditioned upon the satisfactory performance by Settling Party of its obligations under this Settlement Agreement, including but not limited to, payment of all amounts due under Section VI (Payment of Response Costs) and any amount due under Section VII (Failure to Comply with Agreement). This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by Settling Party. If the Financial Information is subsequently determined by EPA to be false or, in any material respect, inaccurate, Settling Party shall forfeit all payments made pursuant to this Settlement Agreement and the covenant not to sue shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose EPA's right to pursue any other causes of action arising from Settling Party's false or materially inaccurate information. This covenant not to sue extends only to Settling Party and does not extend to any other person.

IX. RESERVATIONS OF RIGHTS BY EPA

19. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Settling Party with respect to all matters not expressly included within the Covenant Not to Sue by EPA in Paragraph 18. Notwithstanding any other provision of this Settlement Agreement, EPA reserves all rights against Settling Party with respect to:

- a. liability for failure of Settling Party to meet a requirement of this Settlement Agreement;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- d. liability, based upon Settling Party's ownership or operation of the Site, or upon Settling Party's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Settlement Agreement by Settling Party; and
- e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

20. Notwithstanding any other provision of this Settlement Agreement, EPA reserves, and this Settlement Agreement is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Settlement Agreement, if the Financial Information provided by Settling Party, or the financial certification made by Settling Party in Paragraph 29(b), is false or, in any material respect, inaccurate.

21. Nothing in this Settlement Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against any person, firm, corporation or other entity not a signatory to this Settlement Agreement.

X. COVENANT NOT TO SUE BY SETTLING PARTY

22. Settling Party agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site or this Settlement Agreement, including but not limited to:

- a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the North Carolina Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site. Except as provided in Paragraph 24 (Waiver of Claims) and Paragraph 27 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 19(c) - (e), but only to the extent that Settling Party's claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

23. Nothing in this Settlement Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

24. Settling Party agrees not to assert any claims or causes of action that it may have for all matters relating to the Site (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) against any other person. This waiver shall not apply with respect to any defense, claim, or cause of action that Settling Party may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Party.

XI. EFFECT OF SETTLEMENT/CONTRIBUTION

25. Except as provided in Paragraph 24, nothing in this Settlement Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Settlement Agreement. Except as provided in Paragraph 24, each of the Parties expressly reserves any and all rights (including but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Settlement Agreement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

26. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and that Settling Party is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), or as may be otherwise provided by law, for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are all response actions taken or to be taken and all response costs incurred or to be

incurred, at or in connection with the Site, by the United States or any other person, except for the State; provided, however, that if the United States exercises rights under the reservations in Section VIII (Covenant Not to Sue by EPA), other than in Paragraphs 19(a) (claims for failure to meet a requirement of this settlement) or 19(b) (criminal liability), the "matters addressed" in this Settlement Agreement will no longer include those response costs or response actions that are within the scope of the exercised reservation. In the event that Settling Party's waiver of claims becomes inapplicable in accordance with Paragraph 24, the Parties further agree that this Settlement Agreement constitutes an administrative settlement pursuant to which Settling Party has resolved its liability to the United States, as of the Effective Date, for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), for "matters addressed" as defined above.

27. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Party shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been addressed in this Settlement Agreement; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by EPA set forth in Section VIII.

28. Settling Party shall, with respect to any suit or claim brought against them for matters related to this Settlement Agreement, notify in writing the United States within ten days of service of the complaint on Settling Party. In addition, Settling Party shall notify the United States within ten days of service or receipt of any Motion for Summary Judgment and within ten days of receipt of any order from a court setting a case for trial.

XII. CERTIFICATION

29. Settling Party hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has:

a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the state or the filing of a suit against it regarding the Site and that it has fully complied with any and all EPA requests for documents or information regarding the Site and Settling Party's financial circumstances pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927;

b. submitted to EPA Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time Settling Party executes this Settlement Agreement; and

c. fully disclosed the existence of any insurance policies that may cover claims relating to cleanup of the Site.

XIII. NOTICES AND SUBMISSIONS

30. Whenever, under the terms of this Settlement Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Settlement Agreement with respect to EPA and Settling Party.

As to EPA:

Matthew Hicks
Associate Regional Counsel
United States Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Paula V. Painter
Superfund Enforcement and Information Management Branch
United States Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

As to Settling Party:

Samuel H. Israel
Fox Rothschild, LLP
2000 Market Street, 9th Floor
Philadelphia, PA 19103

XIV. INTEGRATION/APPENDICES

31. This Settlement Agreement and its appendices constitute the final, complete and exclusive agreement and understanding between the Parties with respect to the settlement embodied in this Settlement Agreement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Settlement Agreement. The following appendices are attached to and incorporated into this Settlement Agreement:

Appendix A is a map generally depicting the Site.

Appendix B is a list of the financial documents submitted to EPA by Settling Party.

XV. PUBLIC COMMENT

32. This Settlement Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, the United States may modify or withdraw its consent to this Settlement Agreement if comments received disclose facts or considerations which indicate that this Settlement Agreement is inappropriate, improper, or inadequate.

XVI. EFFECTIVE DATE

33. The Effective Date of this Settlement Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 32 has closed and that comments received, if any, do not require modification of or withdrawal by the United States from this Settlement Agreement.

IT IS SO AGREED:

Air & Electric Equipment Company, Inc.

By: [Signature]

[Name]

6/25/10

[Date]

Vice-President
Title

U.S. Environmental Protection Agency

By: [Signature]

Anita L. Davis

9/29/30

[Date]

Chief, Superfund Enforcement and Information Management Section
Superfund Division

U.S. Environmental Protection Agency, Region 4

61 Forsyth Street, S.W.

Atlanta, Georgia 30303 _____

U.S. Department of Justice

By: 

Robert Dreher

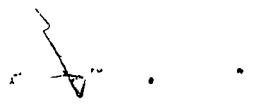
Acting Assistant Attorney General

Environment and Natural Resources Division

U.S. Department of Justice

Washington, D.C. 20530

11/19/10
[Date]



Appendix A: Site Map

Appendix B: List of Financial Documents

1. 1120S Income Tax Returns for 2003 - 2007
2. Compiled Financial Statements for 2003 - 2007
3. Financial Statement of Corporate Debtor